

**HIGH COURT OF TRIPURA
AGARTALA
Crl.A.No.02 of 2018**

Sri Suresh Debbarma,
son of Sri Sona Charan Debbarma
of South Panbua, P.S. Salema,
District : Dhalai, Tripura.

---- Appellant(s)

Versus

State of Tripura

---- Respondent(s)

For Appellant(s) : Mr. D.J. Saha, Adv.

For Respondent(s) : Mr. S. Ghosh, Special PP.

Whether fit for reporting : NO

HON'BLE MR. JUSTICE S. TALAPATRA

Order

29.06.2019

Heard Mr. D.J. Saha, learned counsel appearing for the appellant as well as Mr. S. Ghosh, learned special PP appearing for the state.

2. The appellant was charged under Sections 354(B) and 341 of the IPC separately and under Section 8 of the Protection of Children from Sexual Offences Act, 2012, the POCSO Act, in short as well. After regular trial, the appellant has been convicted under Section 8 of the POCSO Act and Section 341 of the IPC. Pursuant to that conviction, the appellant has been sentenced to suffer three years rigorous imprisonment and to pay fine of Rs.5000/- with default stipulation for committing offence punishable under Section 8 of the POCSO Act and further, he has been sentenced to suffer simple imprisonment for one

month for committing offence punishable under Section 341 of the IPC. To be noted that the appellant was convicted and sentenced by the judgment and order dated 18.12.2017 delivered in Special (POCSO)01 of 2015 by the Special Judge, Unakoti Judicial District, Kamalpur.

Being aggrieved thereof, the convict has preferred this appeal under Section 374(2) of the Cr.P.C.

3. The prosecution against the appellant was launched on the basis of the written complaint filed by one Manoranjan Debbarma [PW-1], the grandfather of the victim [whose name has been withheld for protecting her identity] revealing that while the victim was returning from school with her three friends namely Rumita Debbarma, Rajkanya Debbarma and Priyabala Debbarma, they were intercepted by the appellant and two other accused persons namely Prabir Debbarma and Surajit Debbarma. The accused persons abused her friends and drove them away and thereafter, forcibly, took the victim inside the nearby jungle "to rape her." In the meantime, one person who was working in the nearby field, on seeing the incident had informed the same to the informant. He had immediately reached to the place of occurrence and the accused-persons fled away leaving her granddaughter there. He had approached the local club. One Jatindra Debbarma advised him to approach the Secretary of the club but failed to bring about any settlement. As a result, he filed the complaint in writing on 29.07.2014 at about 13.30 hrs. to the Officer-in-Charge of Salema Police Station, Kamalpur, Dhalai, Tripura. As stated, based on the said complaint, Salema P.S. Case No.22/14 under Section 341 read with Section 34 of the IPC and Section 354(B)/120(B) of the IPC was registered and taken up for investigation. On completion of the investigation, the police filed the final report under Section 173(2) of the Cr.P.C. sending up the

appellant for facing the trial under Section 341/354B of the IPC and under Section 8 of the POCSO Act. The special judge framed the charge for committing offence of wrongful restraint punishable under Section 341 of the IPC, of outraging the modesty of the victim under Section 354B of the IPC, and for committing sexual assault punishable under Section 8 of the POCSO Act. The appellant pleaded innocence and denied the charge claiming to face the trial.

4. In order to substantiate the charge, the prosecution adduced as many as fourteen witnesses including the victim [PW-2] along with eight documentary evidence including the pupilage certificate [Exbt.4]. After recording the evidence of the prosecution, the appellant was examined under Section 313 of the Cr.P.C. when he reiterated his plea of innocence. As the defence did not adduce any evidence, except bringing on record the abstract of the statement of one Sanjit Deb [PW-7] as Exbt.B. On appreciating the evidence, the special Court returned the finding of conviction as stated.

5. Mr. D.J. Saha, learned counsel appearing for the appellant has quite stoutly submitted before this court that lodging of FIR is so belated that it creates serious doubt in the prosecution case. According to Mr. Saha, learned counsel, no explanation either in the complain nor during the trial has been put forward. As a result, the delay remained unexplained. Mr. Saha, learned counsel has further submitted that though the conviction as returned under Section 8 of the POCSO Act, but there is no proof that the victim was a child being below the age of eighteen years, to conform the definition of child as provided under Section(d) of the POCSO Act.

6. Mr. Saha, learned counsel while dilating his plea of innocence has submitted that the prosecution has only produced the

pupilage certificate [Exbt.4] to establish the age of the victim. True it is that, the pupilage certificate [Exbt.4] reflects the death of birth of the victim as 21.08.2000. If that age is believed, there cannot be any amount of doubt that on the day of occurrence, the victim was below the age of eighteen years. But whether the special Court was right in determining the age solely on the basis of that pupilage certificate or not is the fundamental question that falls for consideration of this court.

7. Mr. Saha, learned counsel has finally submitted that the witnesses have provided three different versions of the occurrence and as such, it has become very difficult to hold that the victim was telling the truth. To grind this point further, Mr. Saha, learned counsel has submitted that the complaint was filed, admittedly, after twenty one days. The occurrence took place on 08.07.2014 and the complaint was filed on 21.07.2014. But the version in the complaint has been completely negated by PW-1 by his deposition in the trial. This only shows the amount of improvisation with intent to get the appellant convicted under Section 8 of the POCSO Act.

8. Mr. S. Ghosh, learned special PP appearing for the state has submitted that in view of the catena of decisions of the apex court, it is settled that even if, the pupilage certificate is admissible in the evidence under Section 35 of the Indian Evidence Act, unless, its content is proved, the said content cannot be read, inasmuch as, the person who gave the date of birth to the school authority at the time of admission is not examined in the court. The content in respect of birth cannot be admitted in the evidence. In all fairness, Mr. Ghosh, learned special PP has submitted that even there was no attempt to prove the age by other means including the oral testimony of PW-1 inasmuch as, PW-1 being the grandfather of the victim could have stated in the trial what was the age

of the victim at the time of occurrence, but he did not uttered a single word in respect of date of birth. Therefore, Mr. Ghosh, learned special PP has submitted that he would not make his submission further elaborate in this respect. But Mr. Ghosh, learned special PP has emphatically submitted that if the evidence is appreciated in respect of the wrongful restraint, there is overwhelming evidence and as such, he has urged this court not to interfere with the finding of conviction for committing offence of the wrongful restraint punishable under Section 341 of the IPC.

9. For appreciation of the submissions made by the learned counsel for the parties, it would be apposite to make a short survey of the evidence.

10. PW-1, Monoranjana Debbarma, the grandfather of the victim has stated that the victim was returning home from school with three of her friends and the accused persons namely Suresh Debbarma, Prabir Debbarma and Surajit Debbarma of their village caught hold her and dragged her into the jungle. One Sukachandra Debbarma saw the incident and informed his son Prasenjit over his mobile phone. One of the friends of the victim namely Rumita Debbarma also rushed to her house and narrated the incident and immediately thereafter, Prasenjit and his nephew Nripendra started for the place of occurrence with Rumita. On appearing there, they found the wearing apparels of the victim torn due to her scuffle with the appellant. He has stated that the appellant molested her breast inside the jungle. She was brought to home where she divulged the entire episode. This court would be inclined to state that this statement is entirely new and disclosed for the first time in the trial, inasmuch as, in the complaint PW-1 has stated that after being informed by some unanimous person, he rushed to the place of occurrence and

seeing him, all the accused persons fled away from that place. But in the trial he has stated that he was informed by the victim after her return. When he approached the club one Biswajit Sinha wrote the ejahar for him and he filed the ejahar when the matter could not be sorted out with intervention of that club. He identified his signature on the ejahar which he had filed on 09.07.2014.

He has admitted in the cross-examination that he did not mention in the ejahar that one Sukachandra Debbarma over telephone informed his son. But he denied the suggestion that said Sukachandra did not tell anything to his son, Prasenjit. He has also admitted that he did not state in the ejahar that Prasenjit and Nripendra went to the place of occurrence and that Suresh molested or the victim's wearing apparels were found torn. But his statement under Section 161 Cr.P.C. was shown to the informant but he had denied in the trial that he had made such statement in the complaint. But the scribe has categorically stated that the complaint was written at the dictation of PW-1. Even, PW-1 has also stated in the examination-in-chief that the scribe wrote the complaint correctly and according to his version.

11. PW-2, is the victim as stated, [the name is withheld for protecting her identity] who has stated as follows :

"On the 8th July, 2014 at around 3/4 p.m. while myself along with Priyabala, Rajkanya and Rumita had been returning home from school, on way Suresh, Pradip and Surajit our co-villager dragged me inside a jungle. There Suresh tornd my wearing apparel and molested all over my person. Due to scuffling my wearing apparels got tornd. I raised alarm and started weeping. Priyabala, Rajkanya, Rumita left the place. Prasenjit and Nripendra arrived at the P.O. and recovered me. They also saw the accused person who then fled away. On return I narrated the incident to my grandfather and other family members. My family members did not do anything. On the following day my grandfather lodged case with Salema P.S. I used to live in the family of my grandfather. At the time of the incident I was a student of class VIII of Madhumangal S.B. School."

She has stated that he was examined by a Magistrate at Kailashahar after 20/21 days of lodging the case. She had identified the accused persons and the statement as recorded under Section 164(5) of the Cr.P.C. Nothing material could be elicited from her, during cross-examination.

12. PW-3, Rajkanya Debbarma, PW-5, Rumita Debbarma, PW-6, Priyabala Debbarma, who accompanied the victim in the eve of occurrence, turned hostile in the trial and did not support the prosecution case. In the cross-examination, nothing could be elicited by the prosecution.

13. PW-4, Prasenjit Debbarma, son of PW-1 has stated that on 08.07.2014 at about 3/3.30 p.m. he was at his home. One Sukachandra Debbarma informed him over telephone that his niece [the victim] has been kidnapped by Suresh, Surajit & Pradip of their village. In the meanwhile, Rumita Debbarma, a class mate of the victim went to her house and informed that Suresh had taken her [the victim] to a jungle. Immediately, he and one Nripendra went to the place of occurrence and called the victim by name and she came to them and weeping. Her wearing apparels were torn and wet. He found Suresh running away. The victim informed that on her way to home, Suresh, Pradip and Surajit kidnapped her and Suresh tried to rape her. He approached Jatindra Debbarma who advised him to approach Arun Debbarma and Sailen Debbarma of their local club. When they approached those people, they advised that they cannot settle the matter and as a result, the information was lodged to the police station. In the cross examination, PW-4 denied all the suggestions projected to him, contrary to what has been stated by him in the examination in chief.

14. PW-7, Sanjit Deb did not state anything of material importance.

15. PW-8, Nripen Kr. Debbarma who accompanied PW-4 while rushing to the place of occurrence after having the information from one Suka Charan Debbarma. PW-8, has stated in the trial that when the victim was called out by name, she came out of the jungle weeping and her frock was torn and she was in her school uniform. She has stated to them that Suresh restrained her and dragged her to the nearby jungle and for scuffling, her dress was torn. It would be apparent that there is difference between the statements of PWs 4 & 8. PW-8 did not corroborate that part of the statement made by the victim to PW-4. He did not state, though he was present when the victim stated what happened to her to PW-4 that the appellant attempted to rape her. He denied the suggestions made by the defence.

16. PW-9, Suka Charan Debbarma appears to be a chance witness. He has stated that when he was returning from the market, he found Suresh dragging the victim to the nearby jungle. Surajit and another boy were standing on the road. Immediately over telephone, he informed the matter to Prasenjit. On the following morning, he went to the house of PW-1, his maternal uncle. He has admitted that the appellant is his nephew through his sister. He identified the accused-persons on the dock. He has admitted that he found the appellant dragging the victim to the jungle. He denied to have been made a false statement in the trial being influenced by PW-1.

17. PW-10, Biswajit Singh Choudhury, who wrote the complaint [Exbt.1], has simply stated that whatever, he has written, was written as per dictation of PW-1. He denied the suggestions made in the cross-examination.

18. PW-11, Smt. Mani Marak was a constable of police. She has stated in the trial that she interpreted the Kokbarak statement given by the victim girl to the investigating officer namely Suman Sinha in Bengali which is understandable to the investigating officer and thus, the investigating officer recorded the statements of the victim girl. She has also stated that her mother tongue is Kokborak and she can speak Kokbarak fluently.

19. PW-12, Sanjoy Kairi was the teacher in-Charge of Madhumangal para SB School where the victim was reading and he has admitted in the evidence that the pupilage certificate, where the date of birth of the victim has been recorded as 21.08.2000 was seized from him. After the pupilage certificate [Exbt.4], the admission register on the basis of which the certificate was prepared was produced in the court. It was compared and thereafter, the admission register was admitted in the evidence as Exbt.5. He did not deviate from his statement made in the examination-in-chief, while he was cross-examined.

20. PW-13, Sri Poushdhan Rupini was the officer-in-Charge at Salema P.S. on 29.07.2014. He received the complaint and registered the same. He had endorsed the investigation to Suman Singha, S.I. [PW-14].

21. PW-14, Suman Singha, has stated in the trial that having been endorsed with the investigation, he identified the place of occurrence, prepared the site map and thereafter, arrested the accused Suresh Debbarma and two juveniles who were partners of crime and they acted in conflict with law. He thereafter, recorded the statements of the victim, the informant and her three friends who accompanied her. After completion of the investigation, he submitted the final report.

In the cross-examination, he has stated that he did not produce the victim for her medical examination as no purpose would have been served. There was no visible external injury on her body. Even, there was no allegation of such injury at any point of time.

22. The victim has stated during her examination, under Section 164(5) of the Cr.P.C., as follows :

"On 08.07.2014 A.D. last, at around 3 P.M. I along with my friends namely Rumita, Priyabala Debbarma and Rajkanya Debbarma together were returning home from school. On reaching Dushitali, Suresh Debbarma, Pradip Debbarma and Surajit Debbarma intercepted my friends on the road and driven off my friends. Thereafter, (they) dragged me to the jungle. After taking me to the jungle, three of them caught hold of me and tried to undress me. I kept on wailing. When my friends informed at my home, my two maternal uncles namely Nripendra and Prasenjit reached the place of occurrence and rescued me. Three of them fled from there. The accused persons are of same locality."

23. From a bare reading of this statement as recorded under Section 164(5) of the Cr.P.C. [Exbt.2], it would transpire that at that point of time, the allegation was only that three of them meaning, the accused persons caught hold of her and tried to undressed her. Nothing else has been stated. Even, she did not state that at that time, her wearing apparels were torn. Even, as pointed out by Mr. Saha, learned counsel appearing for the appellant that the police did not seize the wearing apparels and those were not produced in the trial, to be identified by the victim, so that it can be seen by the trial court that immediately, after occurrence, when the apparels were seized, there were marks of tearing. Thus, the prosecution is visited by serious defects and for such defects, the prosecution case cannot be accepted and no presumptive inference can be drawn.

24. Having appreciated the evidence in the touchstone of the submissions made by the learned counsel, this court does not have any hesitation to hold that the charge of wrongful restraint punishable under

Section 341 of the IPC has been well proved. Even though, the versions have some critical difference, but the crucible being the proof the fact that the victim was restrained and taken inside the jungle. She was not allowed to come back and until PW-4 with his friend Nripen Kr. Debbarma [PW-8] reached there. As in India, we do not follow the principle- falsus in uno, falsus in omnibus, and do derive benefit of separating the chaff from the grain. Thus, this court is of the view that the conviction under Section 341 of the IPC cannot be disturbed. However, the prosecution has utterly failed to lay the adequate evidence based on which the charge of sexual assault punishable under Section 8 of the POCSO Act can be held to have proved beyond reasonable doubt. That apart, the age of the victim has not been proved, inasmuch as, in **Alamelu & Anr versus State represented By Inspector Of Police** reported in **(2011) 2 SCC 385**, the apex court has clearly stated the pupillage certificate cannot be the proof of the age but the certificate can be admitted in the evidence as an entry made in the course of official transaction. But the content thereof will not be the part of the evidence, unless, the content is proved by the person who had disclosed the date of birth at the time of admission, if the person is competent to depose about the age of the person.

25. In view of this, this court can without any hesitation hold that, since, the age of the victim has not been proved legally and to the hilt, the conviction under Section 8 of the POCSO Act must fail and accordingly, the conviction under Section 8 of the POCSO Act stands quashed and set aside. The appellant is acquitted from the charge under Section 8 of the POCSO Act on benefit of doubt.

26. In consequence thereof, the sentence for committing offence punishable under Section 8 of the POCSO Act stands set aside.

However, the appellant shall serve out the sentence of rigorous imprisonment of one month as awarded under section 341 of the IPC. It is needless to say that from the substantive sentence, the period of detention that the appellant has suffered, during investigation and trial, shall be set off under Section 428 of the Cr.P.C.

In the result, this appeal stands partly allowed.

Send down the LCRs forthwith.

